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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 335

FLORIDA EAST COAST RAILWAY,
a Florida corporation,

Petitioner,

v.

MARTIN COUNTY, a Political Subdivision
of the State of Florida,

Respondent.

REPLY BRIEF OF PETITIONER

Respondent's brief in opposition serves to highlight the fact that there are substantial rights under the Constitution of the United States involved here in the automatic and absolute imposition on a railroad of the entire cost of constructing and maintaining a grade crossing and the expensive protection devices needed therefor and in the refusal of the Florida court to consider the facts which would determine the fairness and reasonableness of the assignment of costs. We shall deal briefly with each of respondent's points in the order in which they were presented.

I

THE JUDGMENT BELOW NECESSARILY PASSED UPON PETITIONER'S FEDERAL RIGHTS

Respondent Martin County's first point is that this Court is "without jurisdiction" because the judgment of the Florida court rests upon a non-federal ground, independent of any federal ground, adequate to support it. Its argument appears to be that petitioner Railway has not contended to this Court "that the Constitution of Florida deprives it of any rights secured by the Fourteenth Amendment"; that (according to respondent) petitioner's rights under the Florida Constitution "were completely observed", and that the opinion of the Supreme Court of Florida discloses that this case was "decided on grounds not involving any federal question" (Resp. Br. 3-4).*

The answer to these contentions is that the Railway timely, properly and persistently raised its rights and objections under the Constitution of the United States (as well as the Florida Constitution) in both the trial court and the Supreme Court of Florida (see Pet'n 4-7, C-1—C-4), the federal rights thus set up are essential to a determination of the case and the necessary effect of the judgment was to deny them, and they cannot be evaded by the failure of the Florida court to refer to them or by any attempted interpretation of the Florida court's decision as resting on non-federal grounds. The Railway's claims—that its rights under the Fourteenth Amendment, and the interstate commerce clause as well, were violated by the automatic and arbitrary imposition of 100% of the costs on it—cover the

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*"Resp. Br." refers to pages of the Brief for Respondent in Opposition. "Pet'n" refers to pages of the Petition for a Writ of Certiorari to the Supreme Court of Florida, filed July 9, 1965.

whole case and the rights of the parties could not be determined without deciding those claims. *West Chicago St. R. Co.* v. *Illinois ex rel. Chicago,* 201 U. S. 506, 519-20 (1906); *Chicago B. & Q. R. Co.* v. *Illinois ex rel. Drainage Com'rs,* 200 U. S. 561, 579-81 (1906).

II

SUBSTANTIAL FEDERAL QUESTIONS WERE PROPERLY CLAIMED

Without a single citation of authority, and completely ignoring the claims of Constitutional right which were timely and properly made by the Railway below, Point II of respondent's brief asserts that "a substantial federal question has not been raised" because, according to respondent, certain sections of the Florida Statutes cited therein "impose upon petitioner the very burden it protests in the instant case" but were never brought to the attention of the Florida courts or challenged as invalid or unreasonable (Resp. Br. 6). The argument is without legal significance and, in addition, is factually wrong.

1. Even if the alleged facts underlying respondent's argument were correct (and we shall show below that they are not), respondent's argument would not be maintainable. Its only significance would be that petitioner Railway could not proceed herein by way of appeal but would have to proceed by way of a petition for writ of certiorari, which it has in fact done in this case. *Rohr Aircraft Corp.* v. *San Diego County,* 362 U. S. 628, 629-30 (1960); *Wilson* v. *Cook,* 327 U. S. 474, 480-2 (1946); *Charleston Federal Savings & Loan Ass'n* v. *Alderson,* 324 U. S. 182, 184-7 (1945).

2. All three sections of the Florida Statutes cited by respondent were brought to the attention of the Supreme

Court of Florida. Two of them (§ 351.03 and § 317.455, which, as we show below, do not in any event relate to the burden which the Railway has protested) were cited to the Florida court by respondent itself, and the third (§ 357.01) was argued by the Railway not to be applicable.*

3. In its references to § 351.03 and § 317.455 of the Florida Statutes, dealing with certain crossing signals imposed by Florida on railroads, respondent's brief suggests to this Court that the types of crossing signals referred to in those sections are the crossing protection devices for which the Railway has sought compensation in this proceeding. The facts are otherwise. The types of crossing protection devices, the necessity and cost of which the Railway set up in its answer and was prevented from establishing by orders striking those portions of its answer and denying its offer of proof thereon, are automatic crossing protection devices, such as lights, bells and gates (whose construction costs alone were alleged to exceed more than $20,000), and not the relatively inexpensive sign boards or mirror reflectors covered by §§ 351.03 and 317.455.

III

THE CASES CITED BY RESPONDENT EITHER DO NOT MEET PETITIONER'S CLAIM OR ACTUALLY SUPPORT IT

The most striking feature of the effort in Point III of respondent's brief to "up-date" the 1897 case of *Chicago*

*Reprinted *infra* in Appendix A, at pp. A-1—A-2, is an extract from the brief of respondent Martin County, dated November 9, 1963 and submitted to the Supreme Court of Florida, which makes specific reference to and quotes §§ 351.03 and 317.455 (then numbered 320.46) of the Florida Statutes. Also reprinted *infra* in Appendix A, at p. A-3, is an extract from the brief of petitioner Railway, dated August 30, 1963 and submitted to the Supreme Court of Florida, which refers to Chapter 357 of the Florida Statutes (within which § 357.01 is included).

B. & Q. R. Co. v. *Chicago,* 166 U. S. 226, is that, like the opinion of the Supreme Court of Florida, it avoids any discussion or analysis of the 1935 case of *Nashville C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, in which this Court dealt with the effect of the revolution in transportation on the relationship between a state's police power and the allocation of costs for railroad crossings.

The first "up-dating" case cited by respondent, *Erie R. R. Co.* v. *Public Util. Commrs.,* 254 U. S. 394, was decided in January 1921, some 14 years before the *Nashville* case and the same year that Tennessee enacted the statute which this Court said in the *Nashville* case had to be re-examined in the light of changed circumstances. In the *Erie* case, the majority was still proceeding upon the assumption, as expressed in the portion quoted in respondent's brief (p. 10), that the essential, indeed the whole, responsibility of danger in grade crossings rests with railroads, which it described as "the parties introducing the danger" (254 U. S. at 410).

The correctness of this assumption in connection with imposing the total cost of crossings on railroads was expressly rejected by this Court in its 1935 opinion in the *Nashville* case where, in holding unreasonable an automatic statutory imposition of 50% of the costs on a railroad, it found (294 U. S. at 422-3):

> "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." [Footnote omitted]

This conclusion was reflected in the like views of the Interstate Commerce Commission in its 1964 report entitled "Prevention of Rail-Highway Grade-Crossing Accidents

Involving Railway Trains and Motor Vehicles", 322 I. C. C. 1-92, discussed at pp. 9-10 of the Petition.

The discussion in respondent's brief (pp. 10-12) of *Atchison, T. & S. F. Ry* v. *Pub. Util. Comm'n,* 346 U. S. 346 (1953), which was cited in the Petition herein (p. 9), not only misstates the position of the petitioner in this case but also fails to state properly the rationale of the *Atchison* case. Respondent's discussion would make it appear (a) that the questions of whether grade separation costs should be allocated solely on a benefits received basis and whether anything short of this is a taking of property without due process of law and places an unconstitutional burden on interstate commerce are "exactly the same points raised in the present case," and (b) that the ultimate holding in the *Atchison* case was that the cost of such improvements could automatically be allocated to the railroad in the exercise of the police power without consideration of fairness and reasonableness.

In the first place, the petitioner Railway herein has not taken and does not take the position that the costs of grade crossings must be allocated only on a benefits received basis. Rather, it takes the position, which was expressed in the *Nashville* case and re-affirmed in the *Atchison* case, that benefits received are only one factor and that unless the assessment of the costs of public improvements bears a fair and reasonable relationship to all the specific circumstances and persons involved—the facts with respect to which the petitioner was never allowed to present in this case because the pertinent allegations in its answer were stricken and its proffer of proof denied—the allocation must be declared arbitrary and discriminatory.

In the *Atchison* case, the railroad relied solely on the contention, rejected by the Court, that the allocation of the costs of grade separation and improvements is arbitrary

unless imposed on the basis of benefits received. That, however, was not the end of the case or of the opinion. As the Court put it, 346 U. S. at 349:

> "The principal question presented by these appeals is whether the allocation of the reasonable cost of grade separation improvements is arbitrary as to railroads unless imposed on the basis of benefits received, or, since the costs are incurred in the exercise of the police power in the interest of public safety, convenience and necessity, may they be allocated on the basis of *fairness and reasonableness.*" [Emphasis supplied]

In that case, the Public Utilities Commission of California, after considering a variety of facts and evidence, of which benefits derived by the railroad were but one element, found that the railroad should pay 50% of the cost and the municipal authorities the other 50%—as against the railroad's claim that it should pay "only a small part of the costs or nothing, as the case may be" and the municipalities' claim that the "railroads should bear all the costs attributable to the presence of the tracks." (346 U. S. at 351-2) This Court found that "the California Commission considered all the evidence offered, including that going to the benefits received, and properly applied the rule of allocation sanctioned by this court," and that there was "no showing on these records of arbitrariness or unreasonableness in the Commission's orders, and none is claimed except as the Commission refused to allocate costs on the basis of benefits received, which we hold it was not required to do." (346 U. S. at 354)

This Court premised its finding upon the rule expressed in the *Nashville* case that costs could not be properly allocated on an arbitrary and unreasonable basis in the alleged

exercise of the police power. It pointed out that "this Court has consistently held that in the exercise of the police power, the cost of such improvements *may be* allocated all to the railroads" [emphasis in original], but went on immediately to say, citing *Nashville* for the purpose,

> "There is the proper limitation that such allocation of costs must be fair and reasonable."

and that this was the standard followed by the California Commission. (346 U. S. at 352) It then discussed the various facts shown in the *Nashville* case (346 U. S. at 353), summarized the holding of that case as

> "Thus, the contention of the railroad and the rule recognized by this Court in the *Nashville* opinion was that there could be an allocation of costs subject to the limitation that they be allocated always with regard to the rule against unreasonableness and arbitrariness."

and pointed out that the judgment of the Supreme Court of Tennessee had been reversed in the *Nashville* case and the case remanded because the Tennessee court had refused to consider whether, in light of the facts, the statute and order complained of in that case were arbitrary and unreasonable in automatically allocating 50% of the costs to the railroad. (346 U. S. at 354)

It is precisely the refusal of the Florida court herein to consider or to permit consideration of the facts involved, and its automatic imposition of 100% of the costs on the Railway on the ground of the exercise of the state's police power, excluding consideration of reasonableness and fairness, that form the basis for the petition for review by this Court.

The last case cited by respondent, *Goldblatt* v. *Hempstead,* 369 U. S. 590 (1962), adds nothing to respondent's

argument and, if anything, supports petitioner Railway. The essential question decided in that case was simply whether an ordinance prohibiting certain use of property by making excavations below a certain level unlawful was an appropriate exercise of the police power or whether it confiscated property without compensation by preventing the plaintiffs from continuing their business. There is no question raised to this Court in this case of respondent's power or authority to acquire the particular grade crossing or the use thereof. The only question raised to this Court is that of costs and compensation.

We point out, also, that in the *Goldblatt* case, this Court in the course of finding that the regulation there involved was justifiable, stated (369 U. S. at 594):

> "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation."

It then went on to note that there was no showing in the record of "how much, if anything, the imposition of the ordinance would cost the appellants" and that the evidence on "reasonableness" was clearly indecisive (369 U. S. at 595), and said that since the burden on reasonableness was on the landowners-appellants and had not been met, the presumption of reasonableness and of valid exercise of police power would be applied (369 U. S. at 596). This Court was thus looking in the *Goldblatt* record for the very facts which the Florida court prevented the petitioner Railway from proving in this case, *i.e.*, the costs of construction and maintenance made necessary by respondent Martin County's action, and in so doing the Florida court deprived petitioner of its rights under the Constitution of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 9, 1965

APPENDIX A

EXTRACT FROM BRIEF OF MARTIN COUNTY, DATED NOVEMBER 9, 1963, SUBMITTED TO THE SUPREME COURT OF FLORIDA

"The wisdom and correctness of the decision [*Chicago B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, at 255] can be seen when certain Florida Statutes are taken into consideration. Section 351.03, Florida Statutes, states:

> 'Every railway company, whenever its track crosses a highway, shall put up a large signboard at or near said crossing with the following inscription in large letters on both sides of the boards: 'look out for the cars'. In all incorporated cities and towns the said company shall cause the bell on the engine to be run before crossing any of the streets of a city or town, and their trains shall not go faster, through any of the travelled streets or a city or town, than at the rate of 12 miles per hour. This requirement for posting signs shall not apply to railroad crossings having signs as required by Section 320.46.'

"Section 320.46, Florida Statutes,[*] states:

> 'Every railroad company operating or leasing any track intersecting a public road at grade and falling within the purview of Section 320.45, shall place and maintain a suitable signboard on each side of the track or tracks on the right side of the highway not less than 10 feet

*Section 320.46 of the Florida Statutes, here referred to, is the predecessor of Section 317.455 referred to in respondent's brief in opposition to the petition. The former section was repealed, and the latter section added, by the Laws of 1963, effective January 1, 1964. The text is the same except for an internal reference to another section of the Florida Statutes which was also re-numbered by the 1963 revision.

Appendix A

Extract from Brief of Martin County, Dated November 9, 1963, Submitted to the Supreme Court of Florida

"from the ground and 40" x 40", 200 feet from the crossing, which said board shall be painted with black lettering in white background with the following inscription thereon: 'STOP—RAILROAD CROSSING—FLORIDA LAW'; provided, that for use at night said sign board shall be equipped with a suitable mirror reflector of such size, color and description as may be approved by the State Road Department for use at railroad crossings, so designated that same will reflect rays of a motor vehicle headlights; and provided further, that where railroad warning signs have already been placed, or shall hereafter be placed, at any railroad crossing by the State Road Department, said railroad company shall not be required to erect or maintain additional signs or reflectors at such crossings.' "

[pp. 16-17]

Appendix A

EXTRACT FROM BRIEF OF FLORIDA EAST COAST RAILWAY COMPANY, DATED AUGUST 30, 1963, SUBMITTED TO THE SUPREME COURT OF FLORIDA

"While it is not at all clear from the two opinions of the trial Court, the Order-Opinion of November 30, 1963 (40-49) and the Order Denying Petition for Rehearing of February 20, 1963 (55-58), it is probable that the trial Judge considered Chapter 357 Florida Statutes 1961, persuasive because that Chapter was very vigorously urged upon the trial Judge by Counsel for Petitioner. We submit that upon the authority of two cases that have never been overruled this statute cannot constitutionally be applied to a proposed or new county public road grade crossing in the slightest degree, unless and until the County obtains a valid easement therefor by one or more of the four recognized methods—eminent domain, grant, dedication or prescription over the right of way and tracks of a common carrier railroad. Such was the holding of the Florida Supreme Court in McDonald, Mayor, et al. vs. Louisville and N.R. Co., 65 Fla. 310, 61 Sou. 590, decided in March, 1913, and the case of Atlantic Coast Line R. Co. vs. Duval County, 114 Florida 254, 154 Sou. 331. . . ."

[p. 51]